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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 21

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner

v.

GILBERT S. PARNELL, Respondent

NO. 22

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner

v.

FIRST NATIONAL BANK IN INDIANA, Respondent

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the district Court (R. 445-448) is unreported. The opinion of the Court of Appeals (R. 496-504) and the dissenting opinion (R. 505-516) of Judge Goodrich for the minority are reported in 226 F. 2d 297.

JURISDICTION

The judgments of the Court of Appeals were entered October 14, 1955 (R. 517-518). The petition for writs of certiorari was filed December 20, 1955, and was granted February 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the rule announced in *Clearfield Trust Co. v. United States,* 318 U.S. 363, with respect to the rights of the United States on one of its checks, is to be extended to a case arising under diversity jurisdiction and involving only the rights of private parties with respect to the ownership of bonds of an instrumentality of the United States?

In other words, in a diversity case, is the question whether a private defendant converted bonds of an instrumentality of the United States, in Pennsylvania, to be governed by the law of Pennsylvania or by a "federal" law?

2. Assuming that the question of conversion of bonds of an instrumentality of the United States, as between private parties, is to be governed by "federal" law, is the source of that federal law (with respect to such issues as burden of going forward with evidence of good faith and dealing with the bonds after maturity) to be found in old federal decisions or in the provisions of the Negotiable Instruments Law which has been enacted in every state of the Union and by Congress for the District of Columbia?

3. Where theft or defective title has been shown, does not the one who asserts the defense of bona fide purchaser have the burden of proving the defense, under both federal decisional law and the Negotiable Instruments Law of Pennsylvania?

4. May one who takes bonds of an instrumentality of the United States four and one-half years after they have been called and with notice of the call claim the rights of a holder in due course?

STATUTES INVOLVED

The statutory provisions involved are the Rules of Decision Act, 28 U.S.C. §1652; and Section 59 of the Pennsylvania Negotiable Instruments Law, Act of May 16, 1901, P.L. 194, Purdon's Pa. Stat. Ann. Tit. 56, §139 (1930). They are printed in Appendix A. *infra,* p. 46.

STATEMENT

This was a civil action brought by petitioner in the District Court to recover for the conversion of $57,600 principal amount of 3% Series A bearer bonds of Home Owners' Loan Corporation. The jurisdiction of the District Court was invoked on the basis of the diverse citizenship of the parties under 28 U.S.C. §1332.

The bonds here involved were part of a larger group of Home Owners' Loan bonds which had been purchased by petitioner and which were stolen by sneak thieves in May, 1944 while they were being prepared by petitioner's clerk for transmission for payment (R. 32-92). Notice of the loss or theft of the bonds, including the serial numbers of the bonds, was disseminated promptly throughout the United States (R. 93-114).

In September of 1948 the defendant Rocco turned over to the defendant-respondent Parnell, who was a lawyer, $25,000 of stolen West Penn Power Company and United States Treasury bonds (R. 467-475). Parnell took them to the defendant-respondent First National Bank in Indiana, Pa., and the bank, acting through its cashier, disposed of them and gave Parnell a check, which he immediately endorsed and surrendered for currency (R. 467-469, 479-480; 313-314, 348-349).

Eighteen days after this transaction, Parnell brought into the defendant bank $19,600 of the Home Owners' Loan bonds here in suit, and twenty-seven days later brought in the remaining $38,000 of bonds, all of which he had received from Rocco in Pennsylvania (R. 13-14, 303-306). These bonds had been called for payment in 1944 (R. 64) and eight overdue coupons, representing four years' interest, were attached to each bond (R. 175). In each instance Parnell dealt with the cashier, the same man as before, who knew that the Home Owners' Loan bonds had been called for redemption as of a date almost four and a half years earlier (R. 468-469, 313-314, 343).

The defendant bank sent the first group of Home Owners' Loan bonds to the Federal Reserve Bank branch in Pittsburgh for redemption (R. 153, 171, 334-337). The cashier telephoned Parnell when a credit advice was received from Pittsburgh, and Parnell thereupon went to the bank and received a cashier's check, which he immediately cashed at the bank, taking the proceeds in currency in bills of $100 and smaller (R. 316-319, 344). Parnell took the currency to his office, telephoned Rocco that it was there, and paid him in currency. No receipts were given for the bonds; in fact, there were no receipts, correspondence, checks or writings given or received by Parnell except cashier's checks, which he cashed immediately on receipt (R. 311-313).

The $38,000 of bonds involved in the last transaction were handled in the same way, Parnell dealing with the same cashier and turning the cashier's check into small denomination bills immediately upon its receipt (R. 318, 345).

The defendants' attempt to prove their good faith was based almost entirely, if not exclusively, on the testimony of Parnell and of the bank's cashier. The credibility of the defendant Parnell was impeached by his own prior inconsistent testimony in another proceeding (R. 472-478) and also by the testimony of an F.B.I. Agent (R. 319, 371-375) and of the defendant Rocco (R. 482-483, 489-492). The testimony of the cashier, Straitiff, is conflicting in itself (R. 345-346) and also in conflict with the testimony of F.B.I. Agent Myers (R. 345, 353, 381). His credibility was impeached generally by the introduction of the record of his conviction of embezzlement from the defendant bank (R. 390-393).

The jury has indicated by its verdicts that the defendants' testimony, with respect to their good faith, was not believed. The District Judge who also saw and heard the witnesses has said (R. 447): "The question as to whether defendants Parnell and the Bank in Indiana acted innocently and in good faith was for the jury. The jury has spoken and it is believed that the verdict is just and proper under the evidence presented." And Judge Goodrich in his dissenting opinion concluded (R. 513; 226 F. 2d 307): "The facts do not tend to show the regularity and good faith of the transaction, the 'ordinary course of business' aspect of the things the parties were doing. Furthermore, the jury saw the witnesses."

The jury returned verdicts against each of three defendants and in favor of petitioner in the amount of $57,600 (R. 439), and judgments were entered thereon (R. 448). The defendants Gilbert S. Parnell and First National Bank in Indiana appealed. No appeal was

taken by Arthur A. Rocco, the third defendant against whom judgment was entered.

The Court of Appeals for the Third Circuit, after argument on the appeals, ordered a rehearing before the entire bench of seven judges. After this rehearing the judgments appealed from were reversed and the cause remanded upon the opinion of a majority of four members of the court holding that the questions were to be decided under federal law and that under federal law the respondents were not required to establish their defense of good faith purchasers. The court directed that judgment should be entered for the defendant First National Bank in Indiana for want of sufficient evidence of bad faith and a new trial granted the defendant Parnell because of improper instructions as to burden of proof of good faith. Three members of the court dissented in an opinion by Circuit Judge Goodrich.

SUMMARY OF ARGUMENT

I

This is a diversity case. It involves only the rights of private parties, arising out of the ownership of bonds guaranteed by the United States. Under this Court's decision in *Erie R. Co. v. Tompkins,* 304 U.S. 64, this question is to be decided according to the applicable law of the state where the operative events occurred and not under a "general federal law."

To conclude that a question of the sort here involved should be decided under a "general federal law" would involve constitutional questions pointed out in the *Erie* case itself, and alluded to last Term in *Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198. There would be some question whether Congress could validly provide that such questions, arising between private parties, should be subjected to a federal law. That problem need not be faced, however, since Congress has in fact provided in the Rules of Decision Act (28 U.S.C., sec. 1652) that such questions shall be decided in accordance with "The laws of the several states, * * *"

In reaching its result, the Court below relied on this Court's decision in *Clearfield Trust Co. v. United States,* 318 U.S. 363. But that case was not a diversity case. There the United States was itself a party, and the right or cause of action there asserted was not a state-created right. The case involved liabilities on a government check. The law which authorized the issuance and payment of the check was the statutory law of the United States. It is one thing to say that the rights and obligations of the United States are to be

determined under its own law; it is a wholly different thing to say that the rights and liabilities of private parties are also to be decided by federal law although the United States has not, by statute or regulation, entered or in any sense occupied or pre-empted the field.

The distinction is well illustrated by the decision in *United States v. Guaranty Trust Co.*, 293 U.S. 340. That case involved a question of the ownership of an instrument. The Court did not decide it under any "federal" rule, but held that it was controlled by the local law of the place where the transfer had occurred.

The United States has never evidenced any interest in prescribing the rule which should be applied in litigation between private parties who deal in its bonds. The only statute relating to the bonds is completely silent as to the rights of owners and transferees, except that it is provided that the parties are to be free of certain taxes. Similarly, the Regulations issued by the Treasury Department are equally silent so far as the rights of owners and transferees are concerned. This suggests that the rights of owners and transferees as among themselves are of no vital concern to the United States. In the absence of such an interest, no reason is known why such questions should be determined by a nebulous federal law rather than by the applicable law of the states which would be applied to all other similar controversies between private parties.

Experience has shown that the effort to obtain uniformity through the development of a federal decisional law is not likely to succeed. Uniformity of law by the decisional process is slow at best. It is also illusory, unless this Court can be expected to have opportunity

for, and to devote its time to, the development of a law of negotiable instruments separate and apart from that contained in the Negotiable Instruments Law. The pressure of business on this Court means that it is only rarely that a negotiable instruments case can be heard here. Where Congress has not chosen to prescribe a uniform rule with respect to the transfer of government bonds, there is every reason why this Court should not undertake to do so. To attempt to do so would certainly lead to many years of great uncertainty in the field while this Court was fashioning, on a case by case basis, a law of negotiable instruments distinct from the states' statutory law.

II

If the question here involved is to be decided under federal law, the decision below is nevertheless wrong in determining the sources from which that law is to be drawn. This is well illustrated by this Court's decision in *Funk v. United States,* 290 U.S. 371. There, the Court recognized widespread statutory changes in the laws of the states, and held that the federal common law rule there applicable should be determined "in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past." As Judge Learned Hand has said in *New York, N.H. and H. R. Co. v. Reconstruction Finance Corp.,* 180 F.2d 241, 244 (C.C.A. 2nd, 1950): "However, the Negotiable Instruments Law has been enacted in every state of the Union, as well as in the District of Columbia; it is a source of 'federal law'—however that phrase may be construed — more complete and more certain, than any other which can conceivably be drawn

from those sources of 'general law' to which we were accustomed to resort in the days of Swift v. Tyson."

Thus, even if this is a question which is to be determined by a "federal general law", the source of that law should be found in the Negotiable Instruments Law enacted in every state of the union and by Congress for the District of Columbia rather than in decisions of this Court which were decided long before the movement for uniformity which led to the enactment of the N.I.L.

III

The defendants had the burden of proving their asserted defense of being holders in due course. Under the law of Pennsylvania, one claiming the rights of a holder in due course has, as against proof of a prior valid title, the burden of proving all of the necessary elements of his claim to be a holder in due course. This was settled Pennsylvania law prior to the enactment of the Negotiable Instruments Law, and is the uniform construction of Section 59 of the statute. This rule is one of the controversial matters which was resolved by the enactment of the Negotiable Instruments Law. It is the preferable rule, and has been adopted by a number of decisions in the Courts of Appeals, as well as in Pennsylvania. It is the rule which was applied by the District Court in this case, and its decision should be upheld.

IV

In any event, the transactions in the bonds were at such a time as to preclude the defense of bona fide purchase. The bonds here involved were dealt with by the defendants four and one-half years after they had been called for redemption, and with notice of the call.

They had eight uncashed interest coupons attached to them, covering interest for four years. They were handled and presented for redemption, which itself shows that the parties dealing with them knew that their face amount was now due. A person dealing with bonds under such circumstances is precluded, as a matter of law, from claiming the right of a holder in due course. Consequently, the judgments of the District Court should have been affirmed without regard to the question of choice of law or the proper rule as to the burden of proof.

In reaching a contrary conclusion, the Court below relied on the supposed authority of *Morgan v. United States,* 113 U.S. 476. We think that the *Morgan* case is readily distinguishable. First, that case arose under special circumstances. Congress had indicated that the bonds there involved continued to be negotiable. And, second, the bonds there involved were taken some three months after they had been called. Here the delay was four and one-half years after the call. Upon call, the bonds became in effect demand paper. It may well be that three months after call is within a reasonable period during which negotiability will continue. A delay of four and one-half years is certainly more than a reasonable period. Here the bonds showed on their face, because of the interest coupons attached, that they were long past due. The persons who dealt in the bonds, therefore, cannot assume the mantle of holders in due course. On this basis, no defense was offered or available to the defendants, and the judgments of the District Court should have been affirmed on this ground alone, and without passing upon the matter of the governing law or the proper rule with respect to the burden of proof.

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

There has been discussion as to whether or not this statute applies in non-diversity cases such as *Clearfield.*(1) It has never been doubted, however, that the statute is fully applicable where the jurisdiction of the federal court is based on diversity of citizenship. The Court of Appeals does not refer to or discuss this basic and fundamental statute. No basis is known for saying that this is one of the cases to which "the laws of the several states" do not apply so as to bring into effect the reservation at the close of the statute.

The comment in a recent note on the case at bar: "Federal Law Applied to Determine Rights of Private Holders of U.S. Government Bonds," 56 Columbia L. Rev. 438, 439-40 (1956) is in point:

> ". . . Rather than mechanically applying federal law, the instant court might well have directed its attention to whether Congress, in authorizing the issuance of the bonds, impliedly intended to have federal law control the rights of transferees of the bonds as among themselves. Such a finding would seem necessary in order to justify the application of federal law since the Rules of Decisions Act, as interpreted by *Erie R.R. v. Tompkins,* requires the federal courts to apply state law except where

(1) See *Clearfield: Clouded Field of Federal Common Law,* 53 Columbia L. Rev. 991 (1953).

otherwise required by the Constitution, statutes of the United States, or treaties.

"The real issue seems to be whether a failure to apply federal law exclusively would be inconsistent with a congressional purpose or policy. In most cases in which such congressional radiation was found, the rights and liabilities of the United States were in question. But it is difficult to ascertain a federal interest in the outcome of the instant litigation so substantial as to warrant finding an implied congressional intent that federal law be applied. A strong argument against such a finding is that purchasers of bonds would have to be acquainted with two sets of substantive law depending upon whether or not they were buying federal bonds. This, coupled with the often great difficulty of determining just what the federal substantive rule is, as was exemplified in the instant case, would seem to more than offset any possible federal interest in having a uniform rule apply to determine the rights of transferees of government bonds as between themselves. Accordingly, the court should have considered itself bound by the Rules of Decisions Act and have applied state law."

The mandate of the statute is even more demanding in this case than in *Erie*. The problem here is not between the law as established by coordinate courts as it was in *Erie*, but between federal decisional law and state statutory law. In *Burns Mortgage Co. v. Fried*, 292 U.S. 487, decided before *Erie*, this Court unanimously determined that in a case involving only the rights of private parties the statutory law of a state (there, as

here, the Negotiable Instruments Law) and the construction thereof by a state court of last resort could not be rejected in favor of federal decisional law, and that this was true whether the enactment was one which altered the common law or one which merely codified and declared it. In view of the decision in *Burns Mortgage Co.* it would seem proper to refer to the decision below as an extension of *Swift v. Tyson,* 16 Pet. 1, rather than as an extension of *Clearfield.* Certainly, in underlying philosophy and reasoning, the decision here is more a brother of *Swift v. Tyson* than of *Clearfield.* If the decision below is sound, then surely "the ghost of Swift v. Tyson, supra, still walks abroad." *Sampson v. Channell,* 110 F. 2d 754, 761 (C.C.A. 1st, 1940).

(c) *The essential basis of Clearfield.* It is submitted that the essential basis of *Clearfield,* which the court below would extend here to private litigation involving only the rights, as among themselves, of the owners of government bonds, is the fact that the right or cause of action there asserted was not a state-created right. The Government had issued a check which had been endorsed and collected by the defendant on a forged endorsement. The law which authorized the issuance and payment of the check was the statutory law of the United States. *Its* right to recover was dependent on the legal consequences to be attributed to the transaction in which *it* had engaged. Since the right to do the acts was dependent solely on federal law, this Court held that the consequences of the acts were to be determined by the same law. The application of state law would permit the states to limit and condition the legal rights of the United States, and make its rights de-

pendent on the will of the states, a situation objectionable under our dual system of government.

In the present case the question arises between private parties with respect to the ownership of property dealt with in Pennsylvania. The substantive right asserted is created by the law of Pennsylvania. To apply Federal decisional law to the determination of such a right, unless the Constitution or a federal statute so directs, serves no interest of the United States, and introduces an undesirable and fruitless diversity into the law governing private transactions in negotiable paper. It is one thing to say that the rights and obligations of the United States are to be determined under its own law; it is a wholly different thing to say that the rights and liabilities of private parties are also to be decided by federal law although the United States has not, by statute or regulation, entered or in any sense occupied or pre-empted the field.

In *Guaranty Trust Co. v. York,* 326 U.S. 99, Mr. Justice Frankfurter, speaking for the majority of the Court, carefully pointed out at page 109: "Here we are dealing with a right to recover derived not from the United States but from one of the States." Again, at page 112: "The source of substantive rights enforced by a Federal court under diversity jurisdiction, it cannot be said too often, is the law of the States."

The same doctrine is reaffirmed in the opinion of Mr. Justice Douglas (announced by Mr. Justice Reed) in *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530, at 533:

> "* * * But in the present case we look to local law to find the cause of action on which suit is

brought. Since that cause of action is created by local law, the measure of it is to be found only in local law."

Again as recently as *Bernhardt v. Polygraphic Company of America,* 350 U.S. 198, decided only a few months ago, this same fundamental distinction with respect to the law to be applied when the right of recovery owes its existence to one of the States and not to the United States has been emphasized. Mr. Justice Douglas at page 202 said: "We deal here with a right to recover that owes its existence to one of the States, not to the United States."

The cause of action in the case at bar is the ordinary tort action for conversion. No rights are asserted against the United States, or because of anything the United States did or failed to do. It was solely the transactions in which the defendant-respondents had engaged which were controlling with respect to the rights and liabilities of the parties. The legal consequences of their actions are matters for state law. In *Fashion Originators' Guild v. Federal Trade Commission,* 312 U.S. 457, 468, this Court said:

"* * *, whether or not given conduct is tortious is a question of state law, under our decision in Erie R. Co. v. Tompkins, 304 U.S. 64."

And a tort action for conversion is peculiarly a matter of state law. Such an action is based upon ownership of property and unlawful interference with the exclusive right of possession which flows from that ownership. Conversion results from "a distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his title or

rights therein, or in derogation, exclusion, or defiance of such title or rights.": 53 Am. Jur., *Trover and Conversion*, §24, page 819. *U.S. v. Kramel*, — F.2d — (C.C.A. 8th, 1956)[1] is directly in point. It was an action brought by the United States against commission merchants to recover for the conversion of a cow included in a chattel mortgage given to the Farmers Home Administration, a governmental agency. The mortgage prohibited the sale of the mortgaged property without the consent of the mortgagee. The cow had been sold through defendants who had no notice of the violation of the covenant. The court held that, although the action was by the United States to enforce rights under a mortgage taken pursuant to an Act of Congress, state law was controlling. The court said:

> "The Government contends that, by the Farmers Home Administration Act (7 U.S.C.A.), it 'entered into nationwide transactions requiring uniform administration.' In many respects this claim is sound, but is that requirement broad enough to avoid entirely all application of State law to every and all situations and contingencies? *Setting to one side the question of constitutional power, is this Act to be construed as displacing State law governing or affecting titles to property and tort actions for claimed violation of property rights?*"
>
> * * *
>
> "The present action is one in tort, for conversion of a chattel covered by the mortgage. Does this form of action affect the matter of uniformity of administration of this Act so as to manifest a

(1) C.C.A. 8th No. 15,320, decided June 20, 1956 and not yet reported.

congressional intention to remove it from the control of State law? *While trover is a tort proceeding, yet it is an action which is based upon and solely for the protection of a cardinal element of property—possession.* It is an unlawful appropriation of personal property to the legal damage of the rightful possessor. We think this character of action cannot be presumed or construed to be within the purview of this legislation as a matter to be governed by it. There is no element of harmonious administration of the Act involved therein. Such remedies are much the same in the different States but this very litigation is illustrative of the existence of differences. *There should be substantial, if not compelling, reasons to warrant construction of an Act of Congress as replacing State tort laws affecting property rights.* We see none such here." (Emphasis supplied.)

(d) *The decision below is contrary to the essential basis of this Court's decision in United States v. Guaranty Trust Co.*, 293 U.S. 340. That case involved a check of the United States drawn in the District of Columbia and sent by mail to Yugoslavia. It was there transferred by forged endorsement and in due course reached the Guaranty Trust Company, under further endorsements. The Guaranty Trust Company presented it to the United States, and received payment. When the forgery was discovered, the United States sued the Guaranty Trust Company. The decision went against the United States, and it went that way on the ground of ownership of the instrument. The Court looked to the law of Yugoslavia, where the instrument was transferred under the forged endorsement. It found that under the law of Yugoslavia

a transferee in due course, despite the fact that the endorsement was forged, acquired a good title. Consequently, it held that when the Guaranty Trust Company received the check in the United States, it, too, acquired a good title, and, as owner, was entitled to keep the payment which it had received when it gave up the instrument.

The important thing to note here is that the *Guaranty Trust* case was not decided under any supposed "federal" rule. The Court held that the result in the case turned on the ownership of the instrument, as between private parties. It decided that question of ownership in accordance with the local law of the place where the transfer had occurred. That local law was different from any law in effect in the United States. Nevertheless, it was held applicable and controlling in determing the ownership of this instrument, which was a Government check.

It is true that in the *Guaranty Trust* case the check was addressed to Yugoslavia, and the Court said that "It was thereby given something of the quality of a foreign bill; * * *." 293 U.S. at 346. What this apparently means is that the United States sent the check into Yugoslavia and must therefore be deemed to have consented to the application of Yugoslav law, or at least must have understood that Yugoslav law might be applied to questions of transfer of the check. In the present case, the bonds were issued in the United States, and the United States intended that they should circulate throughout the United States, in each one of which the Negotiable Instruments Law is in force. In the absence of a specially prescribed "federal" rule, it seems appropriate to say that the United States understood that

these bonds would circulate in the United States in accordance with the provisions of the Negotiable Instruments Law, so far as ownership by private parties is concerned, just as it was held that the ownership of the check involved in the *Guaranty Trust* case was subject to the law of Yugoslavia when it was sent there.

The decision below is, in principle and in substance, contrary to the basis of this Court's decision in the *Guaranty Trust* case in determining the law applicable to the effect, as between private parties, of the transfer of a Government instrument.

The proper spheres of *Clearfield* and *Guaranty Trust Company* are clearly and concisely delineated in the dissenting opinion (R. 505; 226 F. 2d 303) where Circuit Judge Goodrich said:

> "We think that the Clearfield Trust case has this much to do with the set of facts here and no more. This was a bond issued by the United States or by a government corporation under its authority. The nature of the obligation, we think, is controlled by United States law and the rights and duties of the United States as a party is a matter for federal legislation and regulations. We do not think that the rights of transferees among each other in a transaction taking place in Pennsylvania is a matter of federal law at all but is governed by the law of the state where the operative facts occurred. See Clearfield Trust Co. v. United States, *supra* at 367. See also United States v. Guaranty Trust Co., 293 U.S. 340, 346 (1934)."

Reference may also be made to the long established rule that, though a question of the validity or infringement of a patent is within federal jurisdiction, a question

involving the transfer or assignment of patent rights does not present a federal matter. *Luckett v. Delpark, Inc.*, 270 U.S. 496; *Wade v. Lawder*, 165 U.S. 624; *Wilson v. Sandford*, 10 How. 99.

See also *Willcuts v. Bunn*, 282 U. S. 216, holding that gain derived from the sale of municipal bonds not issued at a discount may properly be subjected to Federal income tax, where the Court by Chief Justice Hughes said, at page 227:

> "The sale of the bonds by their owners, after they have been issued by the state or municipality, is a transaction distinct from the contracts made by the government in the bonds themselves, and the profits on such sales are in a different category of income from that of the interest payable on the bonds."

Further, as a matter of legal theory and as the learned Circuit Judge who spoke for the minority pointed out (R. 505) there is another analogy in the "sharp distinction made in the law between the law which governs the nature of a contract, including its assignability, and the law which is looked to to determine whether a given transaction assigns the contractual rights."

Finally, wholly apart from legal theory and settled principles of law, there is a great practical difference in the necessity for applying a single federal rule to cases involving the rights and obligations of the Government and to cases where the rights and obligations of the Government are not in issue. There is much to be said for the desirability, if not the necessity, of relieving those engaged in the day-to-day operations of the Gov-

ernment from being obliged to refer to the laws of the several states. Government attorneys are directly concerned, however, only with whether or not the rights of the United States as a borrower and as a party liable on the bonds are protected. On the other hand, it is the private lawyer in Pennsylvania or California who is directly concerned when the question involves the rights of clients acquiring or disposing of bonds. The language of Judge Lumbard in *Reconstruction Finance Corporation v. United Distillers Products Corp.*, 229 F. 2d 665, 667 (C.C.A. 2d, 1956) is pertinent:

> "* * * The principle to be applied here is not one which will affect the day to day dealings of the R.F.C., the contracts it makes, or the instruments which it executes. On the other hand, the validity of a conveyance of a real property is a matter peculiarly within the area necessarily governed by state law. We think this is a situation in which the state law furnishes 'convenient solutions in no way inconsistent with adequate protection of the federal interest.' "

(e) *The remoteness of any interest of the United States.* The decision of the Court of Appeals is predicated upon three assumptions, viz.: (i) that the United States has an interest (undefined) in the outcome of litigation between holders of Government bonds; (ii) that in order to protect this interest, there must be uniformity in the determination of the rights of owners as against transferees of such bonds; and (iii) that such uniformity will be attained if these rights are determined by federal decisional law rather than state stat-

utory law. It is submitted that all three assumptions are unsound, and that the decision introduces uncertainty and confusion which may actually work against the interest of the United States.

If the United States has in fact any substantial interest in the outcome of litigation between private parties who deal in its bonds, the proper and effective way to achieve uniformity of result would be to state the rule deemed proper in a statute or appropriate regulation. This has not been done. The only statute[1] relating to the bonds authorizes their issue and is completely silent as to the rights of owners and transferees, except that it is provided that the bonds are to be free of certain taxes. The United States Treasury Department Regulations[2] are equally silent so far as the rights of owners and transferees are concerned. These regulations set forth in considerable detail the procedures followed by the Treasury Department in making payments on the public debt and are very careful to point out that the Treasury Department cannot undertake to protect owners of lost or stolen coupon bonds or notes. They do not purport to touch upon the rights of owners and transferees as among themselves.

The Court of Appeals has not shown in any way how the United States would benefit by having applicable to United States bonds a rule as to the rights of transferees which is contrary to the rule applicable in most of the states of the Union with respect to the rights of transferees of other bonds. The absence of any pro-

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(1) Home Owners' Loan Act of 1933, 48 Stat. 128 (1933), 12 U.S.C. §§1461 et seq.

(2) Title 31, Code of Federal Regulations, Chapter II, Part 306.

vision in the statute authorizing the issuance of the bonds and in Treasury Department regulations suggests rather strongly that the rights of owners and transferees as among themselves are of no vital concern to the United States. This is not surprising. We find it difficult to believe that the salability of Government securities will be substantially affected one way or another by the determination of disputes among owners and transferees. Assuming, however, that the United States does have some interest in such disputes, we submit that investors are more likely to be deterred from investing in, than encouraged to invest in, Government bonds by rules of law which make it easier for a thief to dispose of a Government bond than bonds of private corporations. The United States is concerned with the interest and attitude of the first purchaser of Government bonds. No interest of the United States can be promoted by encouraging and protecting those who take stolen Government bonds.

The third assumption, that a better uniformity of result will be achieved by applying federal decisional law rather than a uniform law adopted in all forty-eight states and the District of Columbia, is also unsound. Uniformity of law by the decisional process is slow and costly. It is also illusory, unless this Court can be expected to have opportunities for, and to devote its time to, the development of a law of negotiable instruments separate and apart from that contained in the Negotiable Instruments Law. Uniformity by the application of federal decisional law is predicated on the hypothesis that the right of review by this Court provides a full and complete mechanism for reconciling conflicting opinions. The pressure of business on this Court under-

standably makes review here the exception rather than the rule and, as Judge Augustus Hand pointed out in *Cole v. Pennsylvania R. Co.*, 43 F. 2d 953, 957 (C.C.A. 2d, 1930): "Consequently there is much less chance than formerly of securing or even promoting uniformity through the decisions of the Supreme Court."

An interesting analogy to the case at bar is presented in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310. The action was on a policy of marine insurance on a houseboat used for commercial carriage of passengers on an artificial lake between Texas and Oklahoma. The insurer defended on the ground of breaches of warranty against use of the boat for commercial purposes without its consent. It was claimed that the policy had been delivered in Texas, under whose statute a breach of warranty could not constitute a defense unless the breach had contributed to bring about the destruction of the property. The District Court made no finding as to whether the policy had been delivered in Texas but held that, since it was a maritime contract, federal admiralty law, and not state law, governed. The Court of Appeals affirmed a judgment for the defendant. This Court reversed the judgment and remanded the cause to the District Court for trial under appropriate state law. Mr. Justice Black, delivering the opinion of the Court, said at page 319:

> "The hearings on the McCarran Act reveal the complexities and difficulties of an attempt to unify insurance law on a nationwide basis, even by Congress. Courts would find such a task far more difficult. Congress in passing laws is not limited to the narrow factual situation of a particular controversy as courts are in deciding lawsuits. And Congress

could replace the presently functioning state regulations of marine insurance by one comprehensive Act. Courts, however, could only do it piecemeal, on a case-by-case basis. Such a creeping approach would result in leaving marine insurance largely unregulated for years to come."

How long, "on a case-by-case basis," would it take the federal courts to fashion a law of negotiable instruments distinct from the states' statutory law?

In considering the soundness of the decision here, one may properly contrast the "attractive vision of a uniform body of federal law"[1] with these very practical considerations: The whole development of the law of negotiable instruments in this country has been dominated in the past fifty years by the provisions of the Negotiable Instruments Law. The Act has been interpreted and applied in literally thousands of decisions by both state and federal courts. There have been some conflicting interpretations, but these are relatively minor as measured by the degree of uniformity which has been achieved. Federal decisional law independent of the statute has been relatively meager, if not altogether lacking, for the past fifty years. It is interesting to note, for example, that the cases principally relied upon by the majority (*Murray v. Lardner,* 2 Wall. 110, and *Morgan v. United States,* 113 U.S. 476) were decided in 1864 and 1885, respectively. The number and variety of transactions taking place daily in Government securities are very large. Whether these transactions consist of pledges, assignments, gifts or other dispositions, the

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(1) *Guaranty Trust Co. v. York, supra,* at page 103.

rights of the parties in all these transactions would, under the decision of the Court of Appeals, be determined by an archaic and largely non-existent federal decisional law and without the benefit of the provisions of the N.I.L. or the judicial experience under it. The primary source of reference for judges and lawyers called upon to decide or to advise with respect to the effect of such transactions has been the Negotiable Instruments Law. If the decision below stands the fact that the Negotiable Instruments Law and the decisions under it may no longer be relied upon will come as a surprise, we think, to most lawyers and courts and do more to create uncertainty than to remove it. "The general state of the law of negotiable instruments of the United States by 1890, when the movement for uniform laws got under way, was one of complete confusion." Beutel's Brannan Negotiable Instruments Law, 72 (7th Ed., 1948).

The imposition of a uniform federal law distinct from the state law would, in the practical application of the law in the courts, result not in uniformity but in complete confusion. Though in the case at bar the action was only for conversion of Government bonds, the defendants in the case had also attempted to collect on stolen bonds of the West Penn Power Company (R. 467-475). If the theory for which the respondents contend had been applied, what would have been the result in the trial of this diversity action if it had been based on the theft of the West Penn Power bonds as well as Government bonds? The trial judge would have had to give the jury two sets of instructions, one covering the burden of proof as to the Government bonds, the other covering the burden of proof as to the West Penn Power bonds. Even if the jurors could successfully

have kept the matter straight and rendered a fair verdict under such disparate rules, they would surely have left the courthouse with the opinion that the law was foolish. At such a price, achievement of a "uniform federal rule" comes too dear.

II.

If the Question Here Involved Were to Be Decided Under Federal Law, the Source From Which That Law Should Be Drawn Is the Negotiable Instruments Law.

If it be assumed that the question at issue here is to be decided according to a "federal" law, the decision below is nevertheless wrong in determining the source from which that law is to be drawn. This is well illustrated by this Court's decision in *Funk v. United States,* 290 U.S. 371.

That case involved the question whether the wife of the defendant in a criminal case in a federal court was a competent witness in his behalf. Under the rules then applicable, that question was a matter of "common law." This Court had at least twice, and fairly recently, decided that a wife was not a competent witness. *Hendrix v. United States,* 219 U.S. 79, and *Jin Fuey Moy v. United States,* 254 U.S. 189. On the basis of these decisions, the trial court had excluded the defendant's wife as a witness, and this ruling was affirmed by the Court of Appeals for the Fourth Circuit.

When the case came here, however, the decision was reversed. The Court pointed out that legislation generally had removed the disqualification of the wife to testify in the states. In reaching this result, the Court

referred to *Benson v. United States,* 146 U.S. 325, and *Rosen v. United States,* 245 U.S. 467, in both of which cases it was held that a codefendant was a competent witness. In the *Funk* case, the Court said that the conclusion in the *Rosen* and *Benson* cases "was based not upon any definite act of legislation, but upon the trend of congressional opinion and of legislation (that is to say of legislation generally), and upon the great weight of judicial authority which, since the earlier decisions, had developed in support of a more modern rule. In both cases the court necessarily proceeded upon the theory that the resultant modification which these important considerations had wrought in the rules of the old common law was within the power of the courts to declare and make operative." 290 U.S. at 380. The Court then went on to say that where Congress did not exercise its power, it was the duty of the Court "to decide" the question "in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past." 290 U.S. at 382. The Court then held that because of the widespread statutory change the old rule was now out of date, and a more modern rule should be recognized, namely that a wife is a competent witness. The *Hendrix* and the *Jin Fuey Moy* cases were both expressly overruled.

The applicability of the *Funk* case to the problem involved here is clear. On the question of burden of proof the Court of Appeals relied on a decision of this Court in 1864. Since that time, the Negotiable Instruments Law has been written, and has been adopted by every state in the Union, and by Congress for the Dis-

trict of Columbia.[1] Thus, the old rule exemplified by *Murray v. Lardner,* 2 Wall. 110, if correctly interpreted by the court below, is now completely outdated and should no longer be regarded as stating the rule applicable in the federal courts.[2] The parallel between the two situations seems very close. As a matter of fact, the present situation is much stronger than that involved in the *Funk* case, since the cases overruled in the *Funk* case were much more recent, and since the statutory provisions relied on as changing the common law in the *Funk* case were varied, while here the common law of the country, as between private parties, has been restated by the adoption of the Negotiable Instruments Law.

The Negotiable Instruments Law stands, it has been said, "as the first and greatest work which the Commission on Uniform Laws has produced in its fifty years of fruitful labor to unify the statutory law of the United States. The N.I.L. is more than just another commercial statute. It marks the beginning of an epoch of codification and unification of the entire commercial law of the United States." Beutel's Brannan Negotiable Instruments Law, page 79 (7th Ed., 1948).

There are other cases which support the conclusion that even if the matter is to be governed by "federal"

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(1) The dates of adoption and effective dates are set forth in Beutel's Brannan Negotiable Instruments Law, pages 1353-1354 (7th Ed., 1948).

(2) As we contend under point 3, *infra,* page 37, the correct interpretation of the *Lardner* case is that it does not conflict with §59 of the N.I.L.

law, the source of this law should be found in the Negotiable Instruments Law. Reference may be made to *Burns Mortgage Co. v. Fried,* 292 U.S. 487. That case was a diversity case. It was decided in 1934, while *Swift v. Tyson* was still operative, before the decision in *Erie Railroad Co. v. Tompkins.* The case involved a negotiable instrument. Thus, it raised a question of commercial law, and under *Swift v. Tyson* this question was to be decided in accordance with the "federal common law". The Court, speaking through Mr. Justice Roberts, held that the question should be decided under the Negotiable Instruments Law as interpreted and applied by the Florida court. Thus, for this purpose, the decision of the Court amounted to a decision that the "federal common law" in this field was determined by the state law of Florida embodied in the Florida statute and the decision of the Florida Supreme Court.

Other cases presenting a similar approach include *Mutual Life Insurance Co. v. Johnson,* 293 U.S. 335, 340; *Marine National Exchange Bank v. Kalt-Zimmers Manufacturing Co.,* 293 U.S. 357, 366-367; and *Board of County Commissioners v. United States,* 308 U.S. 343, 351-352.

Our position with respect to the source of federal law on such a matter as that here involved is supported by *New York, N.H. & H. R. Co. v. Reconstruction Finance Corporation,* 180 F. 2d 241 (C.C.A. 2d, 1950). That case arose in connection with the reorganization of the New Haven Railroad under Section 77 of the Bankruptcy Act. The question was whether a renunciation of interest was valid. The Reconstruction Finance Corporation contended that the question must be decided in accordance with "federal common law," and not under

Section 122 of the Negotiable Instruments Law as enacted in New York. With respect to this contention, the court speaking through Judge Learned Hand, said (180 F. 2d at 244):

> "The purpose of the doctrine that the transactions of such corporations are not subject to state law, is that such agencies, being national in their scope and aim, shall not be forced to shape their transactions to conform to the varying laws of the places where they occur, or are to be carried out. Uniformity is thought to be essential to the convenient and speedy dispatch of their operations. However, the Negotiable Instruments Law has been enacted in every state of the Union, as well as in the District of Columbia; it is a source of 'federal law'—however that phrase may be construed—more complete and more certain, than any other which can conceivably be drawn from those sources of 'general law' to which we were accustomed to resort in the days of Swift v. Tyson. So far as it applies to the letter of December 21, 1938, it will therefore determine the rights of the respondent and the liabilities of the present petitioner, for it is New York law as well as 'federal law.'"

See also, to similar effect, *Whitin Machine Works v. United States,* 175 F. 2d 504, 507 (C.C.A. 1st, 1949).

One of the serious consequences of the decision in this case is that the dead hand of decisional law developed almost a century ago is perpetuated and placed beyond the power of the states to alter or change, either by judicial decision or statutory enactment. If Pennsylvania is to be no longer free to legislate with respect

to such matters as the morals of the market place, federal rules established at such an early date should not be accepted without critical appraisal of the soundness of the rules in relation to present day conditions. The words of Mr. Justice Black in the dissenting opinion in *Francis v. Southern Pacific Co.*, 333 U.S. 445, at pages 452-453, are peculiarly appropriate here:

> "* * * The old Adams rule, questionable enough in its 1904 environment, should in my judgment be critically examined and then abandoned as wholly incongruous with the accepted pattern of our modern society as embodied in legislative enactments. * * *
>
> I.
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> "It should be noted at the outset that tort law has been fashioned largely by judges, too largely according to the ideas of many. But if judges make rules of law, it would seem that they should keep their minds open in order to exercise a continuing and helpful supervision over the manner in which their laws serve the public. Experience might prove that a rule created by judges should never have been created at all, or that their rule, though originally sound, had become wholly unsuited to new physical and social conditions developed by a dynamic society. A revaluation of social and economic interests affected by the old rule might reveal the unwisdom of its expansion or imperatively require its revision or abandonment."

III.

The Defendant-Respondents Had the Burden of Proving Their Asserted Defense of Being Holders in Due Course.

It is clear under Pennsylvania law that when it has been shown that the title of any person who has negotiated an instrument was defective, one claiming the rights of a holder in due course has the burden of proving that he is such a holder and must prove all the necessary elements. This was settled Pennsylvania law prior to the enactment of the Negotiable Instruments Law and is the uniform construction of Section 59 of the statute. *Kuhns v. The Gettysburg National Bank,* 68 Pa. 445 (1871) (which involved a negotiable United States draft); *Robinson v. Hodgson,* 73 Pa. 203 (1873); *Crittenden v. Hoffman,* 279 Pa. 127, 123 Atl. 661 (1924); *Title Guaranty Company v. Barone,* 319 Pa. 499, 181 Atl. 765 (1935); and *First National Bank of Blairstown v. Goldberg,* 340 Pa. 337, 17 A. 2d 377 (1940).

Prior to the enactment of the Negotiable Instruments Law, the cases in a number of the other states, perhaps a majority of them, and in the Federal courts were to the contrary, at least where "burden of proof" is used in the sense of burden of persuasion. The cases were numerous and often apparently conflicting even within the same jurisdiction. The rule under the common law in the Federal courts, and perhaps a majority of the state jurisdictions, was that it was sufficient for the one claiming to be a holder to show that he acquired the instrument before maturity in the regular course of business and paid value therefor. In some of the cases

this was clearly dictum.[1] In other states it was necessary for the holder to go further and prove want of knowledge on his part, or in other words to prove all the elements necessary to constitute him a holder in due course, including the facts that he took in good faith and without notice of any defect or infirmity in the title of the person negotiating the instrument. This conflict has almost disappeared since the enactment of the Negotiable Instruments Law. Except in three or four states, it is now held that when prior defective title has been shown the burden is cast on the one claiming to be a holder to prove all the requirements prescribed by Section 52,[2] including the requirements that the instrument was taken in good faith and that at the time it was negotiated to him that he had no notice of any defect in the title of the person negotiating it. Some of numerous authorities supporting the conflicting views at common law and also the authorities since the enactment of the Act are collected in *First National Bank & Trust Co. of Muskogee v. Heilman,* 62 F. 2d 157 (C.C.A. 10th, 1932).

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(1) *Murray v. Lardner,* 2 Wall. 110, relied upon by the majority in the court below presented only the question of the correctness of a charge to the effect that the jury might find that the defendants had acted in bad faith if they had reason to be suspicious of the title of the person presenting the bonds. This was held to be erroneous and would be erroneous under the express provisions of the Negotiable Instruments Law. This question is not present in the case at bar. The District Judge charged the jury (R. 426) "Good faith is the opposite of bad faith. To charge a defendant with bad faith, it is not enough to show that the defendants took the bonds under circumstances which ought to excite the suspicions of a prudent man and cause him to make inquiry."

(2) Purdon's Pa. Stat. Ann. Tit. 56, § 132 (1930).

See also *Commercial Trust Co. of New Jersey v. Kealey,* 92 F. 2d 397, 402 (C.C.A. 4th, 1937); Beutel's Brannan Negotiable Instruments Law, 876-882 (7th Ed., 1948); and Annotation, "Effect of fraud in the inception of a bill or note to throw upon a subsequent holder the burden of proving that he is a holder in due couse", 18 A.L.R. 18, 39-52; supplemented in 34 A.L.R. 301 and 57 A.L.R. 1083.

The rule which was in effect in Pennsylvania at common law and which, according to the great weight of authority is the rule in effect under the Negotiable Instruments Law, is the preferable one. Its theory and underlying philosophy is well explained in Britton, Bills and Notes, § 104, pages 437-438, as follows:

> "* * * The genuine bona fide purchaser may be counted upon to convince the jury that he is such. But many a pretended bona fide purchaser, the unscrupulous discounter who always stands ready to take the ill-gotten paper obtained by the fraudulent payee, will be caught in his own web by the majority rule, whereas, under the minority rule, many such purchasers will win, not because they are bona fide, but because the defendant will not be able to get the evidence necessary to show that plaintiff's cultivated innocence was but a mask."

Our position on this point is supported by three cases involving United States bonds decided in Courts of Appeals since the enactment of the Negotiable Instruments Law; *Kean v. National City Bank,* 294 Fed. 214, (C.C.A. 6th, 1923), cert. den., 263 U.S. 729; *C. F. Childs & Co. v. Harris Trust & Savings Bank,* 27 F. 2d 633 (C.C.A. 7th, 1928), cert. den., 278 U.S. 653; and *Queenan v. Mays,* 90 F. 2d 525 (C.C.A. 10th, 1937), cert. den., 302

U.S. 724. Each involved the alleged conversion of United States bonds, and in each it was held that the burden of proving the defense of bona fide purchaser rested upon the party asserting the defense.

In the *Kean* case the court, speaking without reference to state law, said (294 Fed. at 226):

> "As an aid in retrial, it remains only to say that in our opinion the defense of bona fide purchaser is an affirmative defense, and the burden of proving it rests with the defendant. Curtis, Collins & Holbrook Co. v. United States, supra; Wright-Blodgett Co. v. United States, 236 U.S. 397."

The *Childs* case and the *Queenan* case refer to state statutory law, and presumably were applying such law rather than any independent federal decisional law. This does not lessen the applicability of these decisions here, however, since United States bonds were involved and the decision of the court below in this case would preclude the use of state statutory law.

IV.

Regardless of Any Question of Choice of Law or Burden of Proof, One Who Acquires a Bond Four and One-half Years After It Has Been Called for Redemption, and With Notice of the Call, Is Precluded From Claiming the Rights of a Holder in Due Course.

The action of the court below was erroneous (1) if as we contend under Point I, the governing law was the law of Pennsylvania, or (2) if, as we contend under Points II and III, the proper rule as to burden of proof is the rule established by the Negotiable Instruments Law. It is believed that the action was erroneous, irrespective of the final conclusion with respect to either of these matters, for the further reason that the transactions in the bonds were at such a time as to preclude the defense of bona fide purchase.

The court below held, on the supposed authority of *Morgan v. United States,* 113 U.S. 476, that the bonds had been taken before maturity and that the defense of good faith purchase was available, both as to the respondent bank, which admittedly knew that the bonds had been called four and one-half years before being taken by the bank, and as to Parnell, where the testimony is not clear[1].

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(1) Mr. Parnell first denied that he knew that the bonds had been called for redemption but in his Answer to the Complaint he had averred that he took the bonds to the bank for redemption and his final answer to the question as to whether or not he knew that the bonds had been called was "No, I can't say that I did." (R. 312-313). It is submitted that he had the burden of showing affirmatively that he took prior to maturity.

We think the *Morgan* case is not controlling here and is readily distinguishable on two grounds, viz.: (1) Congress had indicated that the bonds there involved were to continue to be negotiable, and (2) the bonds there involved were taken some three months after they had been called and here the bonds were taken four and one-half years after the call. The facts in the *Morgan* case were these. The bonds were Treasury Bonds redeemable any time after July 1, 1870, and payable July 1, 1885. Congress had authorized the refunding of these bonds by the issuance of new bonds to be sold for cash or issued in exchange for the bonds in suit. A banking syndicate had entered into a contract with the Government under the terms of which it was to purchase the new bonds and was to be permitted to make payment in the bonds which had been called for redemption.

This Court gave several reasons for its conclusion that the bonds continued negotiable, but the opinion makes it crystal clear that the principal ground was that Congress had indicated an intention that the old bonds were to continue negotiable after the call, by authorizing them to be accepted in exchange for the new bonds and by entering into a contract with the banking syndicate agreeing that the new bonds could be issued or exchanged for the old bonds. This is a perfectly understandable conclusion, and if the case is limited to its peculiar facts, it does no violence to well settled principles of law.

Passing this question, however, and proceeding to the other great factual difference in the cases, the bonds here involved were negotiated four and one-half years after the call, and had eight uncashed coupons attached to them, covering interest for four years; and they were

handled and presented for redemption, which itself shows that the parties dealing with them knew that their face amount was now due, that is, that their maturity had been accelerated several years in the past. In the *Morgan* case the transaction was only three and one-half months subsequent to the call. Bonds which have been called are the equivalent of demand paper. Demand paper is not overdue until the lapse of a reasonable time, and while three and one-half months may not be an unreasonable time for demand paper to remain in circulation, four and one-half years would certainly seem too long. Judge Goodrich has pointed out in a footnote (R. 508-509; 226 F. 2d 305) that the modern commercial view upon the precise question here involved is expressed in Section 8-305 of the Uniform Commercial Code (Purdon's Pa. Stat. Ann. Tit. 12a, §8-305 (1954)). This section provides in substance that a call for redemption constitutes notice of claims of ownership after one year from the date set for presentment for redemption, or if funds are available for payment after six months from the date set for payment.

The language in the *Morgan* case upon which the majority relies, as Judge Goodrich has pointed out (R. 507; 226 F. 2d 304-305), also seems in conflict with the position taken by Mr. Justice Cardozo in *Smyth v. United States,* 302 U.S. 329, 353, where it is stated that redemption clauses in Government bonds "are provisions for the acceleration of maturity at the pleasure of the Government, and upon publication of the notice for the period stated in the bonds the new date became substituted for the old one as if there from the beginning."

It need not be decided in this case whether or not one who takes a negotiable instrument after the ac-

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ut before the fixed, maturity, without knowl-
accelerated maturity, may claim the defense
in due course. Whatever the proper rule may
ases, we think it clear that one who takes a
fter, and with knowledge of, the accelerated
ould be treated as taking too late. As has
ted, this is the view adopted by the Uniform
Code, which represents the long and careful
many experienced in the field. It has been
f all the others who have considered the
e question is dealt with at considerable length
or Ralph W. Aigler in his "Cases on the Law
Notes" (2nd Ed., West Publishing Company,
points out, at page 344 of that book, that in
ases, and prior to the Negotiable Instruments
g after maturity was treated as a matter of
cting the bona fides of the purchaser. In sup-
s proposition the author quotes the following
r v. Leland, 4 Cush. (Mass.) 456 (1859):

> But where a negotiable note is found in cir-
> cu on after it is due, it carries suspicion on the
> fa f it. The question instantly arises, Why is it
> in culation,—why is it not paid? here is some-
> th wrong. Therefore, although it does not give
> th dorsee notice of any specific matter of defence,
> su as set-off, payment, or fraudulent acquisition,
> yet puts him on inquiry; he takes only such title
> as indorser himself has, and subject to any de-
> fen which would be made, if the suit were brought
> by e indorser."

Coming irectly to the situation where the instrument
is payal at a fixed time but with a provision for ac-

celerated maturity, Professor Aigler states, at pages 347-348:

> "An interesting question arises in connection with instruments payable at a fixed or determinable time, but with a provision for accelerated maturity. Clearly if one purchases such paper after the fixed maturity, he takes too late to be a holder in due course in his own right. *If the maturity has been accelerated and he knows that has happened, then equally clearly he takes too late.* The difficulty arises when a purchase is made after the accelerated maturity but before the fixed maturity and the purchaser has no notice of the acceleration." (Emphasis supplied.)

The same view is taken in Britton, Bills and Notes, Section 121, page 506, where it is said:

> "Where the option to mature has been exercised and the purchaser, before the arrival of the fixed maturity, has knowledge of such fact, clearly he is not a purchaser before maturity. Section 52 (2), by necessary analogy, so provides."

It is submitted that the law as stated by Aigler and Britton is correct and that the *Morgan* case is not to be read as establishing any contrary rule.

If we are correct as to this matter, no defense was available to the defendant-respondents, and the judgments of the District Court should have been affirmed on this ground alone, without passing upon the matter of the governing law or the proper rule with respect to the burden of proof.

CONCLUSION

The question as to whether a defendant has in Pennsylvania converted bonds of an instrumentality of the United States should be determined under the law of Pennsylvania and not under a "federal" law which is to be fashioned in a vain pursuit of uniformity. If, however, a federal rule were to be sought, it should come from the Negotiable Instruments Law, enacted in all the states and in the District of Columbia, rather than from outmoded court decisions of an earlier century. Even if federal decisional law were to be applied in the case at bar, the result should be the same as under the Uniform Negotiable Instruments Law. In any event, in the case at bar, where the bonds involved were acquired, with eight past due coupons attached, four and a half years after they were called for redemption and with notice of the call, we submit that they were not held by the respondents in due course.

It is therefore respectfully submitted that the judgments of the Court of Appeals should be reversed and the judgments of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A.

28 U.S.C. § 1

The law

I.

Constitution C. § 1652. State laws as rules of decision.

Congress oth e laws of the several states, except where the as rules of ution or treaties of the United States or Acts of United State s otherwise require or provide, shall be regarded c. 646, 62 Sta of decision in civil actions in the courts of the States, in cases where they apply. June 25, 1948, 2 Stat. 944.

Section 59 Law, Act of Ann. Tit. 56

II.

59 of the Pennsylvania Negotiable Instruments t of May 16, 1901, P. L. 194, Purdon's Pa. Stat. t. 56, §139 (1930).

§139. E

Every 9. Burden of proof when title is defective.

in due cour ery holder is deemed prima facie, to be a holder person who ourse; but when it is shown that the title of any the burden who has negotiated the instrument was defective, person und den is on the holder to prove that he or some in due cou nder whom he claims acquired the title as holder apply in f ourse. But the last mentioned rule does not instrument favor of a party who became bound on the title. (190 nt prior to the acquisition of such defective 1901, May 16, P. L. 194, ch. I, art. IV. §59.)